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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER	
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ART UNIT	**PAPER NUMBER**
3761	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/750,253	VAN GOMPEL ET AL.	
	Examiner	Art Unit	
	Paula L. Craig	3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *30 October 2007*.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-45* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-45* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on October 30, 2007 has been entered.

Response to Arguments

2. Applicant's arguments with respect to Claims 1-45 have been considered but are moot in view of the new grounds of rejection. Applicant argues that the secondary fasteners 66 and 68 of Suprise are not located laterally inward of the waist flap 82. However, Fig. 2 of Suprise shows that secondary fasteners 66 and 68 are located closer to the longitudinal centerline of the article than is the furthest extension of the side edge of waist flap 82.

Claim Rejections - 35 USC § 112

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 1, 6, 17, 22, 32, and 37 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claims 1, 17, and 32 require that the elastic inner layer is continuous. Claims 6, 22, and 37 require that the elastic inner layer includes a front piece, a back piece, and a crotch piece. Applicant's specification teaches that a continuous elastic inner layer is an alternative to an elastic inner layer composed of a front piece, a back piece and a crotch piece (page 5, lines 15-23). Applicant's specification also describes a continuous elastic inner layer as not being constructed of two or more pieces (page 13, lines 9-10). Claims 1 and 6; 17 and 22; and 32 and 37 are inconsistent with each other.

Claim Rejections - 35 USC § 103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claims 1-15 are rejected under 35 U.S.C. 103(a) as obvious over U. S. Patent Application Publication No. 2002/0072726 to Mishima in view of U.S. Patent No. 6,132,410 to Van Gompel et al.

7. For Claim 1, Mishima '726 teaches a disposable absorbent garment, the disposable absorbent garment having a longitudinal direction and a lateral direction, as well as a front waist region, a back waist region, and a crotch region connecting the front waist region and the back waist region (Figs. 1-9, paragraphs 1, 4-5, 23-26, 46). The disposable absorbent garment includes a continuous elastic inner layer 7, wherein

the elastic inner layer has an elastic inner layer perimeter, with the elastic inner layer perimeter forming two longitudinal side edges and two lateral waist edges (Figs. 1-9, paragraphs 24-30 and 46-47, Claim 1). Mishima teaches the elastic inner layer defining an opening 8 located in an internal position to the elastic inner layer perimeter wherein the opening is an aperture through the inner layer 7 (Figs. 1-9, paragraph 29). An absorbent assembly is attached to the exterior surface of the elastic inner layer, wherein the absorbent assembly includes a topsheet layer 4, a core layer 6 and a barrier layer 5 (Figs. 1-9, paragraphs 25, 28, 50-58). Mishima teaches the topsheet layer and barrier layer having lateral extensions (leak-barrier sheets 15 extend from topsheet 4 and base sheet 5, Figs. 6-9, paragraphs 46-54 and 60-62). Mishima teaches that the lateral extensions 15 may be formed of an inelastic material and joined to the elastic inner layer 7 (Figs. 6-9, paragraph 60). Mishima '726 does not teach C-folding or Z-folding the lateral extensions 15 prior to attachment to the exterior surface of the elastic inner layer 7. Van Gompel '410 teaches a disposable absorbent article with an elastic inner layer and an absorbent assembly with a topsheet layer 28, core layer 48, and barrier layer 30 (elastic inner layer is first and second body panels 52 and 53; Figs. 1-8B, col. 3, line 51 to col. 4, line 40, col. 6, lines 49-65). The topsheet layer 28 and barrier layer 30 have lateral extensions that are Z-folded and attached to the exterior surface of the elastic inner layer prior to attachment to the exterior surface of the elastic inner layer (Abstract, Figs. 1-8B, col. 4, lines 6-40, col. 5, line 21 to col. 6, line 6, col. 14, lines 3-52, col. 15, lines 5-50, col. 16, lines 40-64, col. 25, line 40 to col. 26, line 40). Van Gompel teaches that Z-folding allows the lateral extensions to expand, which relieves the

applied stresses and increases the available volume (col. 4, lines 36-40, col. 5, line 21 to col. 6, line 6, col. 14, lines 3-14, col. 15, lines 5-50). It would have been obvious to modify Mishima to include Z-folding of the lateral extensions, as taught by Van Gompel '410, to allow the lateral extensions to expand and increase the available volume, as taught by Van Gompel. In addition, the limitation of how the lateral extensions are made is being treated as a product by process limitation. As set forth in MPEP 2113 product by process claims are not limited to the manipulations of the recited steps, only to the structure implied by the steps. Once a product appearing to be substantially the same or similar is found, a 35 U.S.C. 102 and/or 103 rejection may be made and the burden is shifted to applicant to show an unobvious difference. See MPEP 2113. See *In re Thorpe,* 227 USPQ 964 (Fed Cir. 1985).

8. For Claims 2 and 3, Mishima '726 teaches the elastic inner layer 7 being elastic in both the lateral and longitudinal directions of the disposable absorbent garment (paragraph 28).

9. For Claim 4, Mishima '726 teaches the elastic inner layer 7 being liquid impermeable (paragraphs 6, 25, 64 and Claim 1).

10. For Claim 5, Mishima '726 teaches the elastic inner layer 7 including two or more layers of materials (paragraphs 52-54).

11. For Claim 6, Mishima '726 teaches the elastic inner layer including a front piece, a back piece, and a crotch piece, wherein the crotch piece is attached to the front piece and the back piece and wherein the front piece and the back piece are elastic in the

lateral direction of the disposable absorbent garment and the crotch piece is elastic in the longitudinal direction of the disposable absorbent garment (paragraph 28).

12. For Claim 7, Figs. 1, 3, and 6-7 of Mishima all show openings which appear to have lengths of from 10% to 80% of the total length of the disposable absorbent garment. Mishima '726 does not expressly teach the opening having a length of from 10% to 80% of a total length of the disposable absorbent garment. In light of the lengths shown in Figs. 1, 3, and 6-7 of Mishima, it would have been obvious to one of ordinary skill in the art for Mishima '726 to include the opening having a length of from 10% to 80% of the total length of the disposable absorbent garment.

13. For Claim 8, Mishima '726 teaches the disposable absorbent garment including an outer layer (base sheet 5 may be a two-layered nonwoven fabric, a composite of a nonwoven fabric laminated with a film, a layer of melt blown nonwoven fabric between two layers of spun bond, etc.; paragraphs 55-57).

14. For Claim 9, Mishima '726 teaches the outer layer having an outer layer perimeter, wherein the outer layer perimeter is bonded to the elastic inner layer perimeter (Figs. 1-9, paragraphs 24-30, 34-36, 41-47, 55-57, 62).

15. For Claim 10, Mishima '726 teaches the elastic inner layer perimeter being bonded to the outer layer with a plurality of ultrasonic, adhesive or thermal bonds (Figs. 1-9, paragraphs 27-28, 62).

16. For Claim 11, Mishima '726 teaches the longitudinal side edges of the elastic inner layer 7 forming leg cuffs (leg cuffs include side edge regions 7c, which extend around wearer's thighs in use; Abstract, Figs. 1-9, paragraphs 29-39, 49).

17. For Claim 12, Mishima '726 teaches that the longitudinal side edges of the topsheet layer 4 and barrier layer 5 are gathered and form leg cuffs (side edges of topsheet 4 and base sheet 5 are gathered by elastic members 10, Figs. 1-9, paragraphs 27, 44, 51, 62).

18. For Claim 13, Mishima '726 teaches the elastic inner layer 7 having an interior surface and an exterior surface (Figs. 1-9, paragraphs 24-29). The exterior surface in the front waist region 20 includes a fastener 12 located laterally inward of each longitudinal side edge (Figs. 1-9, paragraphs 33-34). The interior surface in the back waist region 22 includes a fastener 11 located laterally inward of each longitudinal side edge (Figs. 1-9, paragraphs 33-34).

19. For Claim 14, Fig. 2 of Mishima '726 appears to show the front waist region fastener having a crotch-to-fastener angle of about 45-60 degrees. Mishima does not expressly teach the front waist region fastener having a crotch-to-fastener angle equal to or greater than 45 degrees. In light of the angle shown in Fig. 2 of Mishima, it would have been obvious for the front waist region fastener of Mishima to have a crotch-to-fastener angle equal to or greater than 45 degrees.

20. For Claim 15, Mishima does not teach the front waist region having a front center panel length of equal to or less than 6 inches. However, the front center panel length is a result effective variable, since it affects the fit of the garment. The front center panel length would vary with the size of the intended wearer. The discovery of an optimum value of a result effective variable is ordinarily within the ordinary skill in the art. See *In re Boesch and Slaney,* 205 USPQ 215 (CCPA 1980).

21. Claim 16 is rejected under 35 U.S.C. 103(a) as obvious over Mishima '726 in view of Van Gompel '410, and further in view of Suprise (US 6,174,303).

22. For Claim 16, Mishima '726/Van Gompel '410 teach all the limitations of Claim 15, as described above in paragraph 20. Mishima does not teach the front waist region fastener having a length equal to or less than the front center panel length. However, a front waist region fastener having a length equal to or less than the front center panel length is well known in the art. Suprise confirms this and teaches a front waist region fastener having a length equal to or less than the front center panel length (secondary fasteners 66 and 68, Figs. 1-3, col. 13, lines 42-67). It would have been obvious to one of ordinary skill in the art at the time of the invention to modify Mishima to include the front waist region fastener having a length equal to or less than the front center panel length, as taught by Suprise.

23. Claims 17-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Suprise in view of Mishima '726 and further in view of Van Gompel '410.

24. For Claim 17, Suprise teaches a disposable absorbent garment, the disposable absorbent garment having a longitudinal direction, a lateral direction, a front waist region, a back waist region, and a crotch region that connects the front waist region and the back waist region (Figs. 1-3 and col. 3, line 46 to col. 4, line 12). Suprise has a continuous elastic inner layer (waist flaps 80 and 82, containment flaps 100 and 102, and backsheet 52, which may be integral with each other, Figs. 1-2, col. 10, lines 3-16

and 38-64, col. 11, lines 9-19, col. 12, lines 6-12; note that "continuous" and "integral" are considered by the Examiner to be equivalent terms). The elastic inner layer has an elastic inner layer perimeter which forms two longitudinal side edges and two lateral waist edges (side edges 92 and attached edges 88 of waist flaps 80 and 82, and unattached edges 106 of containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 3-16 and 38-64, and col. 11, lines 38-42). The elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter; the elastic inner layer has an interior surface and an exterior surface (the opening is the space between waist flaps 80 and 82 and between containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 38-64, and col. 11, lines 39-58). Suprise teaches a front ear portion bonded to each longitudinal side edge in the front waist region, with the front ear portion having an interior surface and an exterior surface, and the front ear portion having a fastener on the exterior surface (the outer cover 30 is bonded to the waist flaps 80 and 82 at side edges 38 and 92, with secondary fasteners 66 and 68 on the exterior surface; Figs. 1-3, col. 5, lines 43-54, col. 6, lines 17-29, and col. 14, lines 18-40). Suprise teaches a back ear portion bonded to each longitudinal side edge in the back waist region, with the back ear portion having an interior surface and an exterior surface, and with the back ear portion including a fastener on the interior surface (the outer cover 30 is bonded to the waist flaps 80 and 82 at side edges 38 and 92, with primary fasteners 62 and 64 on the interior surface; Figs. 1-3, col. 5, lines 43-54, col. 6, lines 17-29, col. 13, lines 6-18, and col. 14, lines 18-40). Suprise teaches the absorbent assembly including a topsheet layer 54, a core layer 56, and a barrier layer 52 (Figs. 1-2 and col. 7, lines 55-58).

Suprise teaches the topsheet layer and barrier layer having lateral extensions (containment flaps 100 and 102, Figs. 1-2 and col. 12, lines 6-12). Suprise does not teach the opening being a slit or aperture through the elastic inner layer, nor C-folding or Z-folding the lateral extensions prior to attachment to the exterior surface of the elastic inner layer. Mishima '726 teaches a disposable absorbent article having an elastic inner layer in which the opening is an aperture through the inner layer, as described above for Claim 1 in paragraph 7. Mishima teaches that a continuous elastic inner layer in which the opening is an aperture through the inner layer keeps urine and loose excretions away from the wearer's skin (paragraph 64). It would have been obvious to one of ordinary skill in the art to modify Suprise to include an aperture through the elastic inner layer, as taught by Mishima, so that the elastic inner layer can keep urine and loose excretions away from the wearer's skin, as taught by Mishima. Van Gompel '410 teaches a disposable absorbent article with an elastic inner layer and an absorbent assembly with a topsheet layer 28, core layer 48, and barrier layer 30 (elastic inner layer is first and second body panels 52 and 53; Figs. 1-8B, col. 3, line 51 to col. 4, line 40, col. 6, lines 49-65). The topsheet layer 28 and barrier layer 30 have lateral extensions that are Z-folded and attached to the exterior surface of the elastic inner layer prior to attachment to the exterior surface of the elastic inner layer (Abstract, Figs. 1-8B, col. 4, lines 6-40, col. 5, line 21 to col. 6, line 6, col. 14, lines 3-52, col. 15, lines 5-50, col. 16, lines 40-64, col. 25, line 40 to col. 26, line 40). Van Gompel teaches that Z-folding allows the lateral extensions to expand, which relieves the applied stresses and increases the available volume (col. 4, lines 36-40, col. 5, line 21 to col. 6,

line 6, col. 14, lines 3-14, col. 15, lines 5-50). It would have been obvious to modify Mishima to include Z-folding of the lateral extensions, as taught by Van Gompel '410, to allow the lateral extensions to expand and increase the available volume, as taught by Van Gompel. In addition, the limitation of how the lateral extensions are made is being treated as a product by process limitation. As set forth in MPEP 2113 product by process claims are not limited to the manipulations of the recited steps, only to the structure implied by the steps. Once a product appearing to be substantially the same or similar is found, a 35 U.S.C. 102 and/or 103 rejection may be made and the burden is shifted to applicant to show an unobvious difference. See MPEP 2113. See *In re Thorpe,* 227 USPQ 964 (Fed Cir. 1985).

25. For Claim 32, Suprise teaches a disposable absorbent garment, the disposable absorbent garment having a longitudinal direction, a lateral direction, a front waist region, a back waist region, and a crotch region that connects the front waist region and the back waist region (Figs. 1-3 and col. 3, line 46 to col. 4, line 12). Suprise has a continuous elastic inner layer (waist flaps 80 and 82, containment flaps 100 and 102, and backsheet 52, which may be integral with each other, Figs. 1-2, col. 10, lines 3-16 and 38-64, col. 11, lines 9-19, col. 12, lines 6-12). The elastic inner layer has an elastic inner layer perimeter which forms two longitudinal side edges and two lateral waist edges (side edges 92 and attached edges 88 of waist flaps 80 and 82, and unattached edges 106 of containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 3-16 and 38-64, and col. 11, lines 38-42). The elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter (the opening is the space between

waist flaps 80 and 82 and between containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 38-64, and col. 11, lines 39-58). The elastic inner layer has an interior surface and an exterior surface (Figs. 1-2 and col. 10, lines 38-64). Suprise teaches the front waist region including a fastener located laterally inward of each longitudinal side edge (secondary fasteners 66 and 68, which are located laterally inward of the side edge of waist flap 82, Figs. 1-2 and col. 10, lines 38-64; note Fig. 2 of Suprise shows that secondary fasteners 66 and 68 are located closer to the longitudinal centerline of the article than is the furthest extension of the side edge of waist flap 82). The fastener is adapted to engage into the elastic inner layer of the garment in the back waist region (Fig. 1 and col. 10, lines 59-64, and col. 14, lines 4-18). The back waist region includes a fastener adapted to engage into an outer layer of the garment (primary fasteners 62 and 64, Figs. 1-2 and col. 13, lines 6-18). Suprise teaches the fastener being located laterally inward of a longitudinal side edge of an elastic layer (note outer layer is elastic, col. 4, lines 55-65). Suprise teaches an absorbent assembly attached to the exterior surface of the elastic inner layer (absorbent chassis 36; note that the waist flaps 80 and 82 may be integral with the rest of the absorbent chassis, Figs. 1-2, col. 4, lines 13-20, col. 5, lines 43-58, col. 7, line 55 to col. 8, line 9, col. 10, lines 3-16, and col. 11, lines 3-19). Suprise teaches the absorbent assembly including a topsheet layer, a core layer, and a barrier layer (bodyside liner 54, absorbent core 56, and backsheet 52, Figs. 1-2 and col. 7, lines 55-58). Suprise teaches the topsheet layer and barrier layer having lateral extensions (containment flaps 100 and 102, Figs. 1-2 and col. 12, lines 6-12). Suprise teaches the longitudinal side edges of the inner elastic layer forming leg cuffs

(unattached edges 106 of containment flaps 100 and 102, Figs. 1-2, col. 11, lines 9-58, and col. 12, lines 6-60). The outer layer overlays the absorbent assembly and the exterior surface of the elastic inner layer (outer layer is outer cover 30, Figs. 1-2 and col. 5, lines 19-49). Suprise teaches its fasteners having any shape and size which provide the desired fastening of the diaper about the waist of the wearer (col. 13, lines 38-40). Suprise does not expressly teach the fasteners of the back waist region being located laterally inward of each longitudinal side edge of the elastic inner layer. Suprise also does not teach the opening being a slit or aperture through the elastic inner layer, nor C-folding or Z-folding the lateral extensions prior to attachment to the exterior surface of the elastic inner layer. Applicant's specification does not disclose that having the fasteners of the back waist region located laterally inward of each longitudinal side edge of the elastic inner layer serves any stated purpose or solves any particular problem. *In re Boesch and Slaney,* 205 USPQ 215 (CCPA 1980); *In re Dailey and Eilers*, 149 USPQ 47 (CCPA 1966). In addition, having fasteners of the back waist region located laterally inward of each longitudinal side edge of an elastic inner layer is well known in the art. Mishima confirms this and teaches fasteners of the back waist region located laterally inward of each longitudinal side edge of an elastic inner layer (Figs. 1-9, paragraphs 33-34). In light of Suprise's teaching that the fasteners may have any shape and size which provide the desired fastening of the diaper about the waist, it would have been obvious to modify Suprise to include fasteners of the back waist region being located laterally inward of each longitudinal side edge of the elastic inner layer, as taught by Mishima. Mishima teaches the opening being an aperture through the elastic inner

layer, as described above for Claim 17 in paragraph 24. It would have been obvious to modify Suprise to include the opening being an aperture through the elastic inner layer, for the same reasons as described above for Claim 17 in paragraph 24. Van Gompel teaches Z-folding of lateral extensions prior to attachment to the exterior surface of an elastic inner layer, as described above for Claim 17 in paragraph 24. It would have been obvious to modify Suprise to include Z-folding of the lateral extensions, as taught by Van Gompel '410, for the same reasons as described above for Claim 17 in paragraph 24. In addition, the limitation of how the lateral extensions are made is being treated as a product by process limitation, as described above for Claim 17 in paragraph 24.

26. For Claim 45, Suprise teaches a disposable absorbent garment, the disposable absorbent garment having a longitudinal direction, a lateral direction, a front waist region, a back waist region, and a crotch region that connects the front waist region and the back waist region (Figs. 1-3 and col. 3, line 46 to col. 4, line 12). Suprise has a continuous elastic inner layer (waist flaps 80 and 82, containment flaps 100 and 102, and backsheet 52, which may be integral with each other, Figs. 1-2, col. 10, lines 3-16 and 38-64, col. 11, lines 9-19, col. 12, lines 6-12). The elastic inner layer has an elastic inner layer perimeter which forms two longitudinal side edges and two lateral waist edges (side edges 92 and attached edges 88 of waist flaps 80 and 82, and unattached edges 106 of containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 3-16 and 38-64, and col. 11, lines 38-42). Suprise teaches the elastic inner layer being elastic in both the longitudinal direction and the lateral direction of the disposable absorbent

garment (containment flaps 100 and 102 are elasticized in the longitudinal direction, waist flaps 80 and 82 are elastic in the lateral direction, Figs. 1-2, col. 10, lines 47-52, and col. 12, lines 13-64). The elastic inner layer defines an opening located in an internal position to the elastic inner layer perimeter; the elastic inner layer has an interior surface and an exterior surface (the opening is the space between waist flaps 80 and 82 and between containment flaps 100 and 102, Figs. 1-2 and col. 10, lines 38-64, and col. 11, lines 39-58). Suprise teaches the opening having a length of from 10% to 80% of the total length of the disposable absorbent garment (Fig. 2, col. 10, lines 17-24, col. 11, lines 19-42, Claim 14). The elastic inner layer has an interior surface and an exterior surface (Fig. 2). Suprise teaches a front ear portion bonded to each longitudinal side edge in the front waist region, with the front ear portion having an interior surface and an exterior surface, and the front ear portion having a fastener on the exterior surface (the outer cover 30 is bonded to the waist flaps 80 and 82 at side edges 38 and 92, with secondary fasteners 66 and 68 on the exterior surface; Figs. 1-3, col. 5, lines 43-54, col. 6, lines 17-29, and col. 14, lines 18-40). Suprise teaches a back ear portion bonded to each longitudinal side edge in the back waist region, with the back ear portion having an interior surface and an exterior surface, and with the back ear portion including a fastener on the interior surface (the outer cover 30 is bonded to the waist flaps 80 and 82 at side edges 38 and 92, with primary fasteners 62 and 64 on the interior surface; Figs. 1-3, col. 5, lines 43-54, col. 6, lines 17-29, col. 13, lines 6-18, and col. 14, lines 18-40). Suprise teaches the absorbent assembly including a topsheet layer, a core layer, and a barrier layer (bodyside liner 54, absorbent core 56, and backsheet 52, Figs. 1-2

and col. 7, lines 55-58). Suprise teaches the topsheet layer and barrier layer having lateral extensions (containment flaps 100 and 102, Figs. 1-2 and col. 12, lines 6-12). Suprise teaches the longitudinal side edges of the elastic inner layer forming leg cuffs (unattached edges 106 of containment flaps 100 and 102, Figs. 1-2, col. 11, lines 9-58, and col. 12, lines 6-60). Suprise does not teach the opening being a slit or aperture through the elastic inner layer, nor C-folding or Z-folding the lateral extensions prior to attachment to the exterior surface of the elastic inner layer. Mishima teaches the opening being an aperture through the elastic inner layer, as described above for Claim 17 in paragraph 24. It would have been obvious to modify Suprise to include the opening being an aperture through the elastic inner layer, for the same reasons as described above for Claim 17 in paragraph 24. Van Gompel teaches Z-folding of lateral extensions prior to attachment to the exterior surface of an elastic inner layer, as described above for Claim 17 in paragraph 24. It would have been obvious to modify Suprise to include Z-folding of the lateral extensions, as taught by Van Gompel '410, for the same reasons as described above for Claim 17 in paragraph 24. In addition, the limitation of how the lateral extensions are made is being treated as a product by process limitation, as described above for Claim 17 in paragraph 24.

27. For Claims 18 and 33, Suprise teaches the elastic inner layer being elastic in the lateral direction of the disposable absorbent garment (col. 10, lines 47-52).

28. For Claims 19 and 34, Suprise teaches the elastic inner layer being elastic in both the longitudinal direction and the lateral direction of the disposable absorbent garment (containment flaps 100 and 102 are elasticized in the longitudinal direction,

waist flaps 80 and 82 are elastic in the lateral direction, Figs. 1-2, col. 10, lines 47-52, and col. 12, lines 13-64).

29. For Claims 20 and 35, Suprise teaches the elastic inner layer being liquid impermeable (col. 10, lines 38-52, and col. 11, lines 42-58).

30. For Claims 21 and 36, Suprise teaches the elastic inner layer including two or more layers of materials (waist flaps 80 and 82 and containment flaps 100 and 102, Figs. 1-2, col. 7, lines 31-50 and col. 10, lines 38-68, col. 11, lines 42-60, col. 12, lines 34-64).

31. For Claims 22 and 37, Suprise teaches the elastic inner layer including a front piece, a back piece, and a crotch piece, wherein the crotch piece is attached to the front piece and the back piece, and wherein the front piece and the back piece are elastic in the lateral direction of the disposable absorbent garment and the crotch piece is elastic in the longitudinal direction of the disposable absorbent garment (front piece is waist flap 82, back piece is waist flap 80, crotch piece is containment flaps 100 and 102, Figs. 1-2 col. 10, lines 47-67, col. 11, lines 1-9, and col. 12, lines 13-64).

32. For Claims 23 and 38, Suprise teaches the opening having a length of from 10% to 80% of the total length of the disposable absorbent garment (Fig. 2, col. 10, lines 17-24, col. 11, lines 19-42, Claim 14).

33. For Claims 24 and 39, Suprise teaches the disposable absorbent garment including an outer layer (outer cover 30, Figs. 1-3 and col. 4, line 41 to col. 5, line 42).

34. For Claims 25 and 40, Suprise teaches the outer layer having an outer layer perimeter bonded to the elastic inner layer perimeter (Fig. 2 and col. 5, line 43 to col. 6, line 28).

35. For Claims 26 and 41, Suprise teaches the elastic inner layer perimeter being bonded to the outer layer with a plurality of ultrasonic, adhesive or thermal bonds (Fig. 2 and col. 6, lines 17-24).

36. For Claim 27, Suprise teaches the longitudinal side edges of the elastic inner layer forming leg cuffs (unattached edges 106 of containment flaps 100 and 102, Figs. 1-2, col. 11, lines 9-58, and col. 12, lines 6-60).

37. For Claim 28, Suprise teaches the longitudinal side edges of the topsheet layer and the barrier layer being gathered and forming leg cuffs (containment flaps 100 and 102, Figs. 1 and 2, col. 11, lines 9-19, and col. 12, lines 5-64).

38. For Claims 29 and 42, Suprise teaches its fasteners having any shape and size which provides the desired fastening of the diaper about the waist of the wearer (col. 13, lines 38-40). Suprise does not teach the front waist region fastener having a crotch-to-fastener angle equal to or greater than 45 degrees. The crotch-to-fastener angle is a result effective variable, since it affects the fit of the absorbent garment. The discovery of an optimum value of a result effective variable is ordinarily within the ordinary skill in the art. See *In re Boesch and Slaney,* 205 USPQ 215 (CCPA 1980).

39. For Claims 30 and 43, Suprise does not teach the front waist region having a front center panel length of equal to or less than the 6 inches. However, the front center panel length is a result effective variable, since it affects the fit of the garment. The front

center panel length would vary with the size of the intended wearer. The discovery of an optimum value of a result effective variable is ordinarily within the ordinary skill in the art.

40. For Claims 31 and 44, Suprise teaches the front waist region fastener having a length equal to or less than the front center panel length (secondary fasteners 66 and 68, Figs. 1-3, col. 13, lines 42-67).

Double Patenting

41. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

42. Claims 1-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 34, 38-39, 43-45, and 48-51 of copending Application No. 10/750,402 to Van Gompel et al. in view of

Mishima '726 and Van Gompel '410. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of Van Gompel '402 teach a disposable absorbent garment with an elastic inner layer having an opening in an internal position to the elastic layer perimeter, and an absorbent assembly with a topsheet layer, a core layer, and a barrier layer. The claims of Van Gompel '402 do not teach the opening being a slit or aperture through inner layer, nor the topsheet layer and barrier layer having lateral extensions that are C-folded or Z-folded prior to attachment to the exterior surface of the elastic inner layer. Mishima '726 and Van Gompel '410 teach these limitations, as described above for Claim 1 in paragraph 7. It would have been obvious to modify Van Gompel '402 to include these limitations, for the same reasons as described above for Claim 1 in paragraph 7.

43. Claims 1-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 31-46 of copending Application No. 10/749,761 to Van Gompel et al. in view of Mishima '726 and Van Gompel '410. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of Van Gompel '761 teach a disposable absorbent garment with an elastic inner layer having an opening in an internal position to the elastic layer perimeter, and an absorbent assembly with a topsheet layer, a core layer, and a barrier layer. The claims of Van Gompel '761 do not teach the opening being a slit or aperture through inner layer, nor the topsheet layer and barrier layer having lateral extensions that are C-folded or Z-folded prior to attachment to the exterior surface of the elastic inner layer. Mishima '726 and Van Gompel '410

teach these limitations, as described above for Claim 1 in paragraph 7. It would have been obvious to modify Van Gompel '761 to include these limitations, for the same reasons as described above for Claim 1 in paragraph 7.

44. Claims 1-16 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-2, 7, 10-11, 15-16, 18, 20-21, 23, 28-29, 33-34, 37-38, 40-43, 46-47, 51-52, and 55 of copending Application No. 10/749,366 to Van Gompel et al. in view of Van Gompel '410. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of Van Gompel '366 teach a disposable absorbent garment with an elastic inner layer having an opening which is a slit or aperture through an elastic inner layer, and an absorbent assembly with a topsheet layer, a core layer, and a barrier layer. The claims of Van Gompel '366 do not teach the topsheet layer and barrier layer having lateral extensions that are C-folded or Z-folded prior to attachment to the exterior surface of the elastic inner layer. Van Gompel '410 teaches these limitations, as described above for Claim 1 in paragraph 7. It would have been obvious to modify Van Gompel '761 to include these limitations, for the same reasons as described above for Claim 1 in paragraph 7.

45. Claims 32-45 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over Claims 1-64 of copending Application No. 10/749,368 to Van Gompel et al. in view of Suprise and Van Gompel '410. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of Van Gompel '368 teach a disposable

garment with an elastic inner layer having an opening which is a slit or aperture through the elastic inner layer, a front waist region with a fastener located laterally inward of each longitudinal side edge, the fastener being adapted to engage directly into the elastic inner layer in the back waist region. The claims of Van Gompel '368 do not teach the topsheet layer and barrier layer having lateral extensions that are C-folded or Z-folded prior to attachment to the exterior surface of the elastic inner layer. Suprise and Van Gompel '410 teach the topsheet layer and barrier layer having lateral extensions that are C-folded or Z-folded prior to attachment to the exterior surface of the elastic inner layer, as described above for Claim 32 in paragraph 25. It would have been obvious to modify Van Gompel '368 to include these limitations, for the same reasons as described above for Claim 32 in paragraph 25.

46. These are provisional obviousness-type double patenting rejections because the conflicting claims have not in fact been patented.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Paula L. Craig whose telephone number is (571) 272-5964. The examiner can normally be reached on M-F 8:30 AM to 4:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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